

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD STEVEN HARRISON,

Defendant-Appellant.

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UNPUBLISHED

January 25, 2011

No. 294828

Genesee Circuit Court

LC No. 09-024316-FC

Before: FORT HOOD, P.J., and MURRAY and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment for the murder conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. Because defendant's right to a public trial was not violated and he was not denied a fair trial or the effective assistance of counsel, and because offense variable 3 was correctly scored, we affirm.

Defendant's convictions arise from the shooting death of Pastor Herbert Hart. The victim was driving his vehicle down a street when several bullets were fired into his car. Hart died from a gunshot wound to the head, consistent with a shot from a .40-caliber firearm. The principal evidence implicating defendant was the testimony of codefendant Brandon Sillman, who testified that he was with defendant during the episode, and Kenya Dickerson, who testified that she witnessed the shooting. The testimony indicated that defendant misidentified the victim as a person whom defendant had robbed earlier, and feared retribution. Sillman testified that defendant fired a .40-caliber firearm at the victim's vehicle several times, and Dickerson testified that defendant was the only person shooting. At trial, defendant admitted shooting a .22-caliber firearm during the episode, but claimed that he only fired it toward an open field, and further claimed that it was Sillman who shot directly at the victim's vehicle with a .40-caliber firearm.

**I. RIGHT TO A PUBLIC TRIAL**

On appeal, defendant first argues that his right to a public trial was violated when the trial court closed the courtroom to the public during jury selection. We disagree.

A criminal defendant has a constitutional right to a public trial, US Const, Am VI; Const 1963, art 1, § 20, and that right extends to jury selection. *Presley v Georgia*, 558 US \_\_\_\_; 130 S

Ct 721, 724; 175 L Ed 2d 675, 681 (2010). However, a defendant may waive his right to a public trial. *Singer v United States*, 380 US 24, 35; 85 S Ct 783; 13 L Ed 2d 630 (1965); *People v Smith*, 90 Mich App 20, 23; 282 NW2d 227 (1979). In this case, the following exchange occurred just before jury selection.

*The court:* Before we get started, yesterday afternoon which is late under the Court rules, I received this request from Channel 12 about covering this case. I've just shown both of you, at the sidebar, the copy of the request. I am required, under court rule, as you know both of you, to notify you and have you consult with your client, if you wish, [defense counsel].

*Defense counsel:* If I can just have one moment.

*The court:* And [the prosecution], as to their preference, or position with respect to the request.

*Defense counsel:* Judge, I've had a chance to consult with my client and as long as the Court admonishes the jury not to watch news coverage, which I know the Court's gonna do then I have no objection.

*Prosecutor:* Judge, the People have no objection.

*The court:* Now I cannot have any coverage during jury selection, as you know. And there's no room in my courtroom anyway during jury selection, so all I can tell Channel 12 is after the jury selection is complete I will arrange with the Court Technology person . . . to allow you to see the feed on the fourth floor.

*Defense counsel:* That'll be fine, Judge. Thank you. [Emphasis added.]

Because defendant specifically assented to the trial court's action, he has waived appellate review of this claim.<sup>1</sup> *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Defendant's waiver extinguished any error. *Id.* at 216.

Defendant alternatively argues that defense counsel was ineffective for agreeing to closure of the courtroom during jury selection. Again, we disagree. Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d

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<sup>1</sup> Defendant's contention that defense counsel's "failure to object" was mere forfeiture, thereby permitting review for plain error, is without merit. Whereas "forfeiture is the failure to make the timely assertion of a right," waiver is the "intentional relinquishment or abandonment of a known right." *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999), citing *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993). Here, defense counsel did not simply fail to timely object, but rather expressly agreed to the trial court's action.

922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Defendant has not established these requirements.

A Sixth Amendment claim for denial of a public trial requires, as a preliminary matter, closure of the courtroom to the public. In this case, the record only discloses that a local television station, Channel 12, was restricted from being in the courtroom during jury selection because of a lack of space. There is no indication that the trial court prohibited other members of the public from being present during jury selection, or from any other portion of the trial. In fact, even with Channel 12's "late" request to record the trial, the court arranged for it to view the trial via live feed, thereby exhibiting its intent to accommodate the station. The public trial right benefits a defendant by ensuring a fair trial, ensuring that the judge and prosecutor carry out their duties responsibly, discouraging perjury, and encouraging witnesses to come forward. See *Waller v Georgia*, 467 US 39, 46; 104 S Ct 2210; 81 L Ed 2d 31 (1984). Defendant does not contend, and there is no indication, that any of these values were jeopardized in this case. Further, given that a trial court may justifiably limit attendance of the public at a trial due to the size of a courtroom, *Detroit Free Press v Recorder's Court Judge*, 409 Mich 364, 386-387; 294 NW2d 827 (1980), the absence of any indication that the trial court prohibited other members of the public from being present during jury selection, and the trial court's willingness to accommodate Channel 12 through other means, defense counsel's failure to challenge the trial court's action was not objectively unreasonable. Accordingly, defendant has failed to establish that defense counsel was ineffective in this regard.

## II. IMPROPER TESTIMONY

Next, defendant argues that Sgt. David Dwyre was impermissibly permitted to comment on defendant's credibility. Because defendant did not object to Sgt. Dwyre's testimony at trial, our review of this issue is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

Defendant argues that Sgt. Dwyre impermissibly expressed his opinion regarding the truthfulness of defendant's initial police statement during the following testimony at trial:

*The prosecutor:* Now after the diagram was drawn by the Defendant and he told you this version, what did you do?

*Sgt. Dwyre:* Well, I confronted him. I told him that I—I felt that he was lying to me.

*The prosecutor:* Why?

Sgt. Dwyre: Well, there's a couple of reasons, a few reasons. The first one is I personally felt that *it was unbelievable* that in that short amount of space that a person would come over and give him a handgun and then they would run behind this—this—this Trailblazer. It's just—to me, *it was unbelievable*. Secondly, he told me it was a 22-caliber. I knew from the—from the initial information that I had that he—that he initially said it was a 38-caliber. And—that's essentially it. [Emphasis added.]

It is improper for a witness to provide an opinion regarding the credibility of another witness because credibility is a determination for the trier of fact. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). Here, Sgt. Dwyre was not commenting on the credibility of defendant's testimony at trial, but rather the credibility of defendant's initial police statements. Regardless, to the extent that Sgt. Dwyre's testimony violated the rule in *Buckey*, defendant's substantial rights were not affected.

Defendant bears the burden of showing actual prejudice to warrant reversal. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). The challenged testimony was intended to explain why Sgt. Dwyre continued to question defendant during the police interview. Further, defendant admitted at trial that he told Sgt. Dwyre that he possessed a .40-caliber firearm, despite having previously told the police first that he possessed a .38-caliber firearm, and then later that he possessed a .22-caliber firearm. Thus, defendant's own testimony at trial showed that Sgt. Dwyre had a reason to disbelieve defendant's initial police statements. Consequently, the challenged testimony did not affect defendant's substantial rights.

In a related claim, defendant argues that defense counsel was ineffective for failing to object to Sgt. Dwyre's testimony. In light of our conclusion that the challenged testimony did not affect defendant's substantial rights, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. *Frazier*, 478 Mich at 243. Accordingly, defendant cannot establish his claim of ineffective assistance of counsel.

### III. SCORING OF OFFENSE VARIABLE 3

Lastly, defendant argues that he is entitled to resentencing because the trial court erroneously scored offense variable (OV) 3 of the sentencing guidelines. We disagree.

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). We thus review a sentencing court's scoring to determine whether it properly exercised its discretion. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). A scoring decision "for which there is any evidence in support will be upheld." *Endres*, 269 Mich App at 417. (additional citation omitted).

Twenty-five points should be scored for OV 3 if "[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c). In this case, defendant

discharged a firearm multiple times toward the victim's vehicle, resulting in the victim's death by a gunshot wound to his head. Because the victim was killed, there was permanent injury to him. Defendant concedes that the trial court's 25-point score for OV 3 is supported by our Supreme Court's decision in *People v Houston*, 473 Mich 399; 702 NW2d 530 (2005). In that case, the Supreme Court held that although MCL 777.33(2)(b) precludes a trial court from scoring 100 points for the death of a victim where homicide is the sentencing offense, the court is not precluded from scoring 25 points on the basis of a life-threatening injury that preceded the victim's death. *Id.* at 405. Although defendant contends that *Houston* was wrongly decided, this Court is bound to follow that decision. *People v Hall*, 249 Mich App 262, 270; 643 NW2d 253 (2002). Accordingly, we uphold the trial court's 25-point score for OV 3.

Affirmed.

/s/ Karen Fort Hood  
/s/ Christopher M. Murray  
/s/ Deborah A. Servitto